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No. 88-1079

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROGER KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether, under *McNally* v. *United States,* No. 86-234 (June 24, 1987), petitioner was properly convicted of mail fraud for participating in a scheme to inflate the price of equipment offered for sale to two municipalities.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 860 F.2d 54.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1988. The petition for a writ of certiorari was filed on December 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three months' imprisonment, to be followed by one year of probation. The court of appeals affirmed.

1. As the court of appeals summarized: "The evidence against [petitioner] showed that he participated in a scheme in which the prices of various equipment offered for sale to two municipalities were inflated. Under the scheme, [petitioner] broke the offering price down into several separate components so that corrupt municipal purchasing agents could evade competitive bidding requirements applicable to higher priced items. The total of these prices was then inflated in order to obtain money to pay kickbacks to those agents." Pet. App. 3a.

The evidence at trial is described in more detail in the government's brief in the court of appeals (Gov't C.A. Br. 2-15). It showed that petitioner, the vice-president of John J. King of Monroe, Inc. ("J.J. King"), a distributor of highway maintenance equipment, engaged a person he knew as Vince Silon to sell used equipment on a commission basis in the fall of 1986. Silon was actually Vincent Wincelowicz, an undercover FBI agent investigating corruption in the sale of equipment and supplies to New York municipalities.

In November 1986, Wincelowicz brought Richard Conklin, the highway superintendent for the Town of Deerpark, New York, to J.J. King to inspect a second-hand truck to be used for snow removal. During the visit, Wincelowicz asked petitioner if J.J. King could accommodate Conklin by breaking up the total amount to be charged Deerpark into several small bills in order to avoid competitive bidding. Petitioner agreed to do so. In a subsequent tape-recorded telephone conversation, petitioner quoted a price of $6,500 to Wincelowicz, broken down into three parts. He also promised Wincelowicz a $500 commission on the sale. Gov't C.A. Br. 3-4.

Wincelowicz later told petitioner in another tape-recorded telephone conversation that Conklin wanted the price increased by $2,000, which Conklin would pocket,

and that Conklin also wanted to add a plow to the truck. Petitioner responded that a plow would cost $800. Petitioner further suggested that Wincelowicz should "take care of" Conklin. Pursuant to the discussion, petitioner increased the price by $2,875 to cover Conklin's kickback and the plow, and broke the bill into four parts. After the truck was delivered to Deerpark and the Town paid its four bills totalling $9,375, petitioner gave Wincelowicz a check for $2,875, which represented Conklin's kickback and an additional commission for Wincelowicz. Gov't C.A. Br. 4-7.

The other scheme involved the City of Mount Vernon, New York. After learning that the City would be buying a "spreader" (a device used to spray sand or salt on icy roads), Wincelowicz gave an advance kickback of $500 to Ronald Iaboni, the City's Commissioner of Public Works. Petitioner advised Wincelowicz that a large spreader would cost about $6,000. In tape-recorded conversations in November and December of 1986, Wincelowicz said that it again would be necessary to break the bill into smaller parts and that $2,000 would have to be added for Iaboni. Petitioner ultimately agreed to charge $10,200, to be billed in five parts. Wincelowicz similarly arranged for the City of Mount Vernon to buy a small spreader, which petitioner said should cost about $3,000, for $6,000. That sum included a $1,000 kickback. The small spreader was delivered in February of 1987 and the City promptly paid a bill for $3,820 that petitioner had submitted. No further payments had been made, and the large spreader had not been delivered, when Wincelowicz's undercover assignment ended abruptly, in March 1987, after he was identified as an FBI agent. Gov't C.A. Br. 7-15.

2. The court of appeals affirmed petitioner's conviction (Pet. App. 1a-4a). The court first rejected petitioner's

claim that the mail fraud convictions could not stand because the government had failed to prove that either the Town of Deerpark or the City of Mount Vernon actually lost money. Petitioner's claim was based on testimony that the truck Deerpark bought was worth the sales price[1] and the fact that the Mount Vernon transaction had not been completed. The court observed: "[A]s we have said many times, the validity of a mail fraud conviction does not hinge upon a showing of actual loss by the intended victim. It is enough that [petitioner] knowingly devised a scheme to defraud and caused the use of the mails in furtherance of the scheme. * * * [U]ltimate success is not an element of the crime." Pet. App. 3a (citations omitted).

The court of appeals also concluded that this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), did not require reversal of petitioner's convictions since "[t]he schemes here were unquestionably directed at money in municipal treasuries" (Pet. App. 4a). The court explained that "[t]he fact that kickbacks were also involved in *McNally* is of no aid to [petitioner] because the legal theory of those convictions was based on the alleged deprivation of intangible rights, while [petitioner's] conviction was specifically bottomed on the deprivation of what is undeniably property in a traditional sense" (*ibid.*).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 8-9), proof of an actual loss of money or property by the intended victim is not an essential element of mail fraud. The mail fraud statute, 18 U.S.C. 1341, prohibits persons who,

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[1] Although petitioner's witness examined the truck the day before he testified and stated that it was worth at least $10,000, he was not aware that the truck's engine had exploded within a month of its delivery and had been replaced. Gov't C.A. Br. 18.

"having devised or intending to devise any scheme or artifice to defraud," from using the mails "for the purpose of executing such scheme or artifice or attempting to do so." The statute therefore expressly reaches not only those persons who successfully carry out schemes to defraud, but also those who intend to devise such schemes and attempt to execute them. Accordingly, the statute does not require the government to prove that the victim of the scheme to defraud was actually defrauded; the government is only required to prove that a defendant "*contemplated* some actual harm or injury" to the victim of the scheme. *United States* v. *Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (emphasis in original); see also *United States* v. *Eskow*, 422 F.2d 1060, 1064 (2d Cir.), cert. denied, 398 U.S. 959 (1970); *United States* v. *Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966).

This Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), did not alter that long-standing principle. The defendants there were convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights" (slip op. 10), the Court reversed. Noting that "the Government now relies in part on the assertion that the petitioner obtained property by means of false representations," the Court concluded that the convictions could not be upheld on that basis because "there was *nothing* in the jury charge that required such a finding" (slip op. 10-11) (emphasis added). All that the jury in *McNally* had to find to convict, as the Court subsequently noted in *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), was that Kentucky had been deprived of the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute" (slip op. 6).

Nor does this Court's decision in *Carpenter* support petitioner's contention. In that case, the Court made clear that the property protected by the mail fraud statute includes intangible property, stating that "*McNally* did not limit the scope of §1341 to tangible as distinguished from intangible property rights" (slip op. 6). Indeed, the Court reiterated that the mail fraud statute "reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises" (*id.* at 7), and held that a conspiracy to trade on an employer's confidential business information is within the reach of the statute.

McNally and *Carpenter* therefore established that the mail fraud statute did not reach schemes to defraud citizens of their intangible rights to honest and impartial government, but was limited in scope to the protection of property rights. Nothing in *McNally* or *Carpenter*, however, required the government to prove that the victim of the scheme suffered an actual loss of money or property. Instead, *McNally* and *Carpenter* simply required the government to show that the *object* of the scheme was to deprive the victim of money or property.

The decision of the court of appeals in this case is thus fully consistent with *McNally* and *Carpenter*. This case involved a straightforward kickback scheme through which petitioner agreed to pay unearned commissions to the municipal purchasing agents in order to sell his equipment to the municipalities. The other courts of appeals that have addressed the issue since *McNally* have overwhelmingly agreed that normal kickback schemes involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Rico Industries, Inc.*, 854 F.2d 710 (5th Cir. 1988), cert. denied, No. 88-1111 (Mar. 20, 1989); *United States* v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, No. 88-532 (Jan. 17, 1989); *United*

States v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), cert. denied, No. 87-1946 (Oct. 3, 1988); *United States* v. *Piccolo*, 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988); *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987); *United States* v. *Fagan*, 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988).

2. There is likewise no merit in petitioner's contention that the decision of the court of appeals here conflicts with the decisions in *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir. 1987), and *United States* v. *Shelton*, 848 F.2d 1485 (10th Cir. 1988).

In *Gimbel*, the Seventh Circuit held that a scheme to avoid filing currency transaction reports was a scheme to defraud the Treasury Department of "intangible rights" in data rather than a scheme to deprive the government of money or property. Rejecting the government's argument that it may have been deprived of tax revenues because the information, if disclosed, might have led to an assessment of tax deficiencies, the court concluded that the possibility of such an assessment did not convert the scheme into one to defraud the United States of money (830 F.2d at 626-627). In this case, by contrast, the intended effect on the municipalities' treasuries was direct rather than speculative. Moreover, and contrary to petitioner's contention (Pet. 9), the Seventh Circuit did not read *McNally* to require proof of an actual loss of money or property by the victim as an element of mail fraud. Indeed, the court expressly declined to "express any view as to whether a scheme that has not reached fruition, and in which there is no resulting loss of money or property, may ever form the basis of a mail fraud prosecution" (830 F.2d at 627 n.3).

In *Shelton*, the Tenth Circuit reversed the mail fraud convictions of two county commissioners who took kickbacks from suppliers selling goods to the county.

Contrary to petitioner's contention, though, the court in *Shelton* did not hold that proof of an actual loss by the victim was an element of mail fraud. Instead, the court merely concluded that the money or property that is the object of the scheme to defraud must be that of the victim. The court pointed out that, under the unusual facts of that case, "the evidence at trial tended to show that the sales were made at a previously established low price and that the kickbacks were paid out of the suppliers' profits" rather than out of inflated prices paid by the county (848 F.2d at 1491). Here, by contrast, as in most kickback cases, the court of appeals correctly concluded (Pet. App. 3a-4a) that the evidence established that the kickbacks would ultimately be paid by the Town of Deerpark and the City of Mount Vernon.[2]

3. Finally, Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the

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[2] Petitioner also mistakenly claims that the decision of the court of appeals here conflicts with *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988). To be sure, the court in *Evans* stated in dictum that "[i]f a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property" (*id.* at 39). Taken in the context of its entire discussion, however, the court was simply considering whether the money or property that the defendants sought to obtain as a result of the scheme to defraud must belong to the alleged victim, and not whether the victim must suffer an actual loss of money or property. In any event, petitioner's claim of an intracircuit conflict raises an issue for the court of appeals, and not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). As the court of appeals stated (Pet. App. 3a), the rule that the victim of a scheme to defraud need not actually lose money or property was well established prior to *McNally*. Even if the opinion in *McNally* had questioned that rule, that case will no longer govern mail fraud prosecutions in the future, as Congress has made plain. Moreover, persons who participate in schemes to bribe municipal employees may now be prosecuted for depriving the citizens of their intangible right to honest government, whether or not the municipalities lost money or other property. Thus, there is no prospective importance to petitioner's contention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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